No. 87-966

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1987

LAKBIR MOULAY ISMAILI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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15 pp

QUESTION PRESENTED

Whether the district court abused its discretion under Fed. R. Crim. P. 15(a) by denying petitioner's motion to take the depositions of witnesses in foreign countries.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-53) is reported at 828 F.2d 153.

JURISDICTION

The judgment of the court of appeals was entered on September 2, 1987. The petition for a writ of certiorari was filed on November 25, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following the denial of his motions to depose foreign witnesses, petitioner entered a conditional plea of nolo contendere in the United States District Court for the District of New Jersey to one count of mail fraud, in violation of 18 U.S.C. 1341. Petitioner was sentenced to five years' probation; he was fined $1,000; and, as a condition

of probation, he was ordered to pay restitution in the amount of $43,210.80. The court of appeals affirmed.

1. From November 1979 through December 1980, petitioner and his company, Incoser, operated a "bait and switch" scheme in which he told American manufacturers of customized vans that he could sell their products in the Middle East (Pet. App. 2-3). As alleged in the indictment (C.A. App. 10a), petitioner represented that "he was a well-financed importer and exporter of various types of motor vehicles, with offices and agents in the Middle East, and elsewhere." He further represented that he already had a "marketing and distribution network in place in the Middle East and elsewhere actively engaged in the promotion and sales of various motor vehicles" (*ibid.*). Petitioner requested that the manufacturers pay the cost of producing "color separations," which are sets of color negatives used to produce magazine quality photographs, that would be used to advertise the vans abroad (Pet. App. 3). Petitioner arranged visits for some of his customers to a New Jersey printing plant that, he claimed, was making the color separations (*ibid.*; see also C.A. App. 185a-188a). Twenty American van manufacturers provided petitioner with a total of $43,210.80 to pay for the color separations. Petitioner, however, converted the money to his own personal use. No color separations were made; no brochures were published; and petitioner never purchased any vans from any of the manufacturers. Pet. App. 3.

2. a. Following his indictment on 17 counts of mail fraud, petitioner moved pursuant to Fed. R. Crim. P. 15(a) to depose three witnesses in Saudi Arabia. In support of that motion, petitioner submitted a telex stating that the three witnesses were part of a sales team recruited by a man named Al Ahmed to sell the vans in Saudi Arabia on behalf of petitioner's company. The telex also stated that the men were awaiting promotional materials and prices

for the vans when Ahmed, who subsequently died during the war in Lebanon in 1982, told them to cease operations until the unrest in the Middle East stabilized. According to the telex, the three Saudis recruited by Ahmed were "not willing to spend time or money" to come to the United States to testify at petitioner's trial. Pet. App. 5-6, 18-19; C.A. App. 34a.

The district court denied petitioner's motion (see Pet. App. 6-7; C.A. App. 116a-117a, 123a-124a). The court found that petitioner had not shown "that providing for [these witnesses] to come to the United States still is inadequate to get them here" (C.A. App. 123a). The court also found that petitioner had not adequately demonstrated "how they would assist in his defense" (*ibid.*).

b. Five days before trial was scheduled to begin, petitioner filed a new motion to depose witnesses in Syria, Morocco, and Saudi Arabia, and to have the government bear the costs of the depositions (Pet. App. 7). With respect to the Saudi witnesses, petitioner resubmitted the telex that had been attached to his original motion. With respect to the Syrian and Moroccan witnesses, petitioner submitted the affidavits of a private investigator, Josiah Thompson, who had interviewed the prospective witnesses. See *id.* at 7-10.

Thompson interviewed four Syrians who claimed to have been recruited to sell the vans in Syria and Lebanon. None of the men had had any contact with petitioner. The first, Bassam Al Khtib, was recruited by Al Ahmed in 1980. The other three witnesses were in turn recruited by Bassam. All four paid Ahmed for the right to serve as sales representatives for Incoser, but their checks were returned after instability in the region ended the project. The Syrian witnesses expressed reluctance to come to the United States to testify. Two of them stated that they could not do so because they were still eligible for the draft

in Syria. Another stated that he was in ill health, and the fourth explained that he could not leave his job to travel. Pet. App. 7, 9-10; C.A. App. 85a-110a.

Thompson also interviewed two Moroccans. According to Thompson, those men were allegedly involved in producing the color separations. The first, Rachid Ismaili, who is petitioner's brother, claimed that in 1979 he approached Abdurrahim Ezzarai, a lithographer, about developing film and that he subsequently gave Ezzarai 50 pieces of film. According to Thompson, Rachid stated that he paid Ezzarai with money from petitioner's personal funds in Morocco and that he also gave Ezzarai two cars as collateral; the cars, however, were seized by customs authorities. Rachid stated that the project terminated due to the outbreak of the Iran-Iraq war. He also stated that he was willing to come to the United States to testify, and indeed had traveled to the United States as recently as 1980. Rachid's passport had since lapsed, but neither Thompson nor petitioner asked him to obtain a new one. Pet. App. 8, 10; C.A. App. 76a-78a, 204a-222a.

Ezzarai told Thompson that Rachid had given him 50 pieces of film and that he had commissioned a now-defunct company to do the separations. According to Thompson, Ezzarai reportedly denied that he had ever heard of petitioner or his company Incoser in interviews with the Moroccan police. Ezzarai also reportedly said that he would come to the United States to testify if someone would get him a passport, pay his back taxes (approximately $500), and support his family during his absence. The Vice-Consul at the U.S. Embassy in Rabat told Thompson that passports are routinely denied to Moroccan subjects and that Ezzarai was out of favor with Moroccan officials. The Vice-Consul sent a diplomatic note to the foreign ministry to help obtain a passport for Ezzarai. Pet. App. 8-9, 10; C.A. App. 73a-82a.

Following an evidentiary hearing at which Thompson testified (C.A. App. 140a-238a), the district court denied petitioner's motions to take foreign depositions (*id.* at 6a). Petitioner and the government then entered into a conditional nolo contendere plea agreement, which enabled petitioner to preserve the deposition issue for appeal (*id.* at 111a-113a).

3. The court of appeals affirmed (Pet. App. 1-53). The court ruled that petitioner had not made a sufficient showing that the foreign witnesses were unavailable and that their testimony was material.

The court first held (Pet. App. 14-16) that petitioner had failed to establish the unavailability of the two Moroccan witnesses. According to the court (*id.* at 14-15 (emphasis and footnote omitted)), "[t]here was no evidence offered that either Rachid or Ezzarai had tried and was in fact unable to procure a passport or would refuse or was unable to attend trial in the United States." The court further noted (*id.* at 15) that it appeared that neither of the witnesses "had been informed that they were entitled to have [petitioner] bear their travel expenses, witness fees, and a subsistence allowance."[1] Such a "misapprehension," the court concluded (*ibid.*), would "necessarily undermine[] the alleged good faith efforts of the [petitioner] to have these witnesses appear at trial for live testimony."

The court next concluded (Pet. App. 16-18) that petitioner had failed to make a sufficient showing of the

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[1] The court noted (Pet. App. 15-16 n.5) that because petitioner did not produce any evidence of his financial condition until sentencing, he did not establish that he was entitled to have the government pay for the foreign depositions. The record of the sentencing hearing shows, moreover, that petitioner owned four condominiums and one villa in Florida, as well as other real estate in Morocco and Europe, and that he had bank accounts in several countries (see *id.* at 15 n.4).

materiality of the testimony of the Syrian witnesses. According to the court (*id.* at 17), their testimony would be "second or third-hand hearsay," because they claimed that they were enlisted to sell vans either by Ahmed, who was no longer living, or by Ahmed's representative, Bassam, and they could provide no information about the color separations or the preparation of promotional literature, which was the "heart of [petitioner's] sales pitch." Finally, the court found (*id.* at 17-18 (emphasis in original)) that even if the Syrians could testify that petitioner attempted to form a sales group, that testimony would not refute the charges, because "[p]roposals by [petitioner] to employ the Syrian witnesses in the *future* could not stand as proof that [petitioner] had a marketing and distribution network *already in place*, and was *actively engaged* in the promotion and sale of vehicles—facts which [petitioner] had represented to the van manufacturers."

Finally, the court of appeals agreed (Pet. App. 18-19) with the district court that with respect to the Saudi witnesses petitioner failed both to establish that they were unavailable and that their testimony was material. The telex indicated that they were under the false impression that they had to spend their own money for travel to the United States (see *id.* at 19). The telex also disclosed that these individuals, who also had been recruited by Ahmed, were not "actively engaged in the promotion and sales of Incoser's motor vehicles" (*ibid.*).

Judge Becker dissented (Pet. App. 35-53). He concluded (*id.* at 41-44) that petitioner had established the unavailability of the two Moroccan witnesses, based on the practical difficulty of obtaining passports and on Ezzarai's financial demands. He also concluded (*id.* at 44-48) that petitioner had made an adequate showing of the materiality of the testimony of the Syrian witnesses. In Judge Becker's view (*id.* at 45), the proffered testimony might

have negated the government's theory of prosecution by suggesting that "[petitioner's] business scheme was not a complete fabrication but was a legitimate, even if exaggerated business plan." With respect to the Saudi witnesses, however, Judge Becker concluded (*id.* at 48-49) that although depositions could be taken, they could not be admitted at trial absent a stronger showing that the witnesses were unavailable.[2]

ARGUMENT

1. Petitioner's claim is a narrow one. He recognizes that in criminal cases, depositions can be taken and preserved for use at trial only in "exceptional circumstances" (Fed. R. Crim. P. 15(a)). Moreover, he does not dispute the court of appeals' ruling that foreign depositions need not be authorized pursuant to Rule 15(a) unless the moving party shows both that the witness is unavailable and that his testimony is material. Petitioner's argument (Pet. 20-29) is simply that the court of appeals applied that admittedly proper legal standard incorrectly to the facts of this case, and that the court of appeals applied Rule 15(a) more stringently than did the Second Circuit in two cases in which the government was the moving party. See *United States* v. *Johnpoll*, 739 F.2d 702, cert. denied, 469 U.S. 1075 (1984), and *United States* v. *Sindona*, 636 F.2d 792 (1980), cert. denied, 451 U.S. 912 (1981). Contrary to petitioner's claim, however, there is no conflict

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[2] Judge Becker also stated (Pet. App. 52-53) that he would at least remand the case for the district court's reconsideration in light of the government's stipulation in the plea agreement that it would not produce Ezzarai for trial. In Judge Becker's view, the district court, when it denied petitioner's motion, might have relied on the government's prior representation that it would produce Ezzarai as a witness at the trial.

between the Second Circuit's decisions in those two cases and the Third Circuit's decision in this case. There is no suggestion in either the court of appeals' opinion in this case or the Second Circuit's opinions in *Johnpoll* and *Sindona* that a less searching judicial inquiry is appropriate when the government is the moving party. Rather, the two courts simply applied the same legal analysis to very different facts.

A substantially stronger showing of unavailability and materiality was made in *Johnpoll* and *Sindona*. For instance, in both *Johnpoll* and *Sindona*, the witnesses refused to travel to the United States although the moving party had promised to pay the witnesses' basic expenses (see 636 F.2d at 804; 739 F.2d at 709). In *Johnpoll*, moreover, the district court granted the Rule 15 motion only after negotiations with the witnesses, ordered by the district court, failed to reduce their demands for additional compensation and after the Attorney General declined the prosecutor's request for funding above the normal statutory limit (see 739 F.2d at 709, citing 28 U.S.C. 1821). As the court of appeals found (Pet. App. 15), however, the record in this case did not similarly establish that the Moroccan witnesses "had been informed that they were entitled to have [petitioner] bear their travel expenses, witness fees, and a subsistence allowance."[3] Likewise, there was "clear evidence that the [Saudi Arabian] witnesses were under the impression that they would be obliged to spend their own money for expenses" (*id.* at 19).

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[3] In addition, although Rachid Ismaili did not have a current passport, there was no evidence that petitioner requested that Rachid attempt to procure one, even though Rachid had visited the United States as recently as 1980. See Pet. App. 14-15 n.3.

The showing as to the materiality of the proffered testimony of the Syrian and Saudi witnesses was also much less substantial in this case than in the Second Circuit cases. In *Johnpoll*, the foreign witnesses had "dealt extensively" with the defendant and the court found it "unlikely that [the defendant] could have been convicted without their testimony" (739 F.2d at 709).[4] As the court of appeals found (Pet. App. 18), however, the proffered testimony of the Syrian witnesses in this case does not suggest that any could "negate the crux of the government's indictment that [petitioner] made false statements which induced the U.S. prospects to give him money." None of the witnesses dealt personally with petitioner; none "could testify at first hand to the preparation of the color separations; or to the preparation of promotional literature, which was at the heart of [petitioner's] sales pitch to the American van manufacturers"; and none "could substantiate with anything other than hearsay [petitioner's] claim that a sales network existed throughout the Middle East." *Id.* at 17. The proposed testimony of the Saudi Arabian witnesses was likewise insufficiently material. As described by the court of appeals (*id.* at 18-19), it consisted of hearsay and actually contradicted, rather than supported, petitioner's claim that a Middle Eastern sales force was in place.[5]

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[4] Materiality is not discussed in *Sindona*, presumably because it was not disputed in the court of appeals.

[5] The circumstances under which petitioner's motion was made in the district court provide further support for the district court's ruling in this case. First, the court's ruling may have been prompted by the lateness of petitioner's second Rule 15 motion, which was filed five days before trial and outside the time allowed by the district court for pretrial motions (see C.A. App. 5a). Second, petitioner's second Rule 15 motion sought to have the government pay the expenses of any depositions authorized, although petitioner had not shown that he was

Quite apart from the factual differences among the cases, the difference in the outcome of this case and the outcome of *Johnpoll* and *Sindona* is the product of the standard of review on appeal. The standard of review in all three cases was the same: whether the district court order amounted to a "clear abuse of discretion" (see Pet. App. 12 (quoting *United States* v. *Johnpoll*, 739 F.2d at 708); *United States* v. *Sindona*, 636 F.2d at 803). In all three cases, the court of appeals concluded that the district court had acted within its discretion and, accordingly, upheld the district court's ruling. The essence of discretion is that in a close case, a district court may either grant or deny relief, and in either case its ruling will be upheld on appeal. See H. Hart & A. Sacks, The Legal Process 162 (1958) (unpublished manuscript) (quoted in Friendly, *Indiscretion About Discretion*, 31 Emory L.J. 747, 754 (1982)) (Discretion is "the power to choose between two or more courses of action each of which is thought of as permissible."). For that reason, a circuit conflict is not presented whenever two appellate courts uphold district court rulings, even when the district courts have reached different conclusions on similar facts.

2. Petitioner speculates (Pet. 30-32) that the district court may have denied his motion to depose Ezzarai because it believed that the government was going to produce Ezzarai at trial. Petitioner argues that the case should therefore be remanded to the district court to allow that court to reconsider its ruling with respect to Ezzarai in light of the government's statement in the plea agreement that it did not plan to produce him as a witness at trial.

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unable to pay the expenses himself. The district court could properly have denied the request for depositions on either of those two grounds without ever reaching the questions of the availability of the witnesses and the materiality of their expected testimony.

Rather than supporting petitioner's position, the change in circumstances regarding Ezzarai's status supports the ruling of the district court. At the time the district court ruled on petitioner's motion to depose the foreign witnesses, it was the understanding of the parties and the court that Ezzarai would appear as a government witness (C.A. App. 168a, 190a). For that reason, there was no need for the court to consider petitioner's request to depose Ezzarai. Indeed, petitioner recognized as much during the hearing on his request for foreign depositions (*id.* at 168a). Therefore, the district court cannot be faulted for having refused to order a deposition for Ezzarai. For the same reason, the court of appeals cannot be faulted for upholding the district court's ruling, even though at the time petitioner entered his plea, the government no longer planned to call Ezzarai as a witness. If petitioner believed that the government's decision not to call Ezzarai might have affected the district court's ruling on his motion for depositions, petitioner should have filed a new motion to depose Ezzarai, raising that point, before he formally entered his plea. Having failed to bring to the district court's attention the fact that Ezzarai would not be present at trial as a government witness, petitioner cannot now rely on the assertion that the change in circumstances would have required a different order by the district court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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